No. 72-6041

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

DAVE PERNELL,

Petitioner,

v.

SOUTHALL REALTY,

Respondent.

ON WRIT OF CERTIORARI TO THE
DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF FOR PETITIONER DAVE PERNELL

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OPINION BELOW

The opinion of the District of Columbia Court of Appeals is reported at 294 A.2d 490 (A. 14).[1]

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[1] Citations to "A.___" are to the appendix filed in this Court and citations to "R.___" are to the record transmitted to this Court by the court below.

JURISDICTION

The judgment of the District of Columbia Court of Appeals was entered on August 31, 1972 (A. 31). On November 16, 1972, Chief Justice Burger granted an extension of time for the filing of the petition for certiorari to and including January 13, 1973; the petition was filed within that period; and it was granted on April 2, 1973. Jurisdiction of this Court to review the decision below is conferred by 28 U.S.C. §1253(3) (1970).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Seventh Amendment to the Constitution of the United States and D.C. Code §16-1501 to 1505 (1967 and Supp. V, 1972) are set forth in Appendix A to this brief at pp. 1a-2a, below.

QUESTIONS PRESENTED

1. Whether the Seventh Amendment guarantees a trial by jury in a proceeding brought by a landlord against his tenant to determine the right to possession of real property, pursuant to D.C. Code §§16-1501 to 1505 (1967 and Supp. V, 1972).

2. Whether the Seventh Amendment guarantees a trial by jury on money claims for back rent paid and repairs made by the tenant where those claims are asserted in the same statutory eviction proceeding.

STATEMENT OF THE CASE

A. The History and Nature of the District of Columbia Statutory Eviction Proceeding

1. Virtually since the establishment of the District of Columbia as the Nation's Capital in 1800, there has been

a statutory eviction proceeding in which landlords could obtain a swift determination of the right to possession and could secure the eviction of tenants who, for nonpayment of rent or other reasons, were no longer entitled to possession. Under successive statutory revisions continuing into this decade, either party to the eviction proceeding was entitled on timely demand to a trial by jury. Consequently, in the District of Columbia the link between the statutory eviction proceeding and trial by jury is over a century and a half old.

In the Organic Act of 1801, Congress adopted for the District the common law and statutes then in force in Maryland. 2 Stat. 104. Included among the Maryland statutes thus adopted was one providing "a summary mode of recovering the possession of lands and tenements" commencing with a complaint by the landlord and subject to a trial by jury.[2] The statute directed the landlord to file his complaint with the justices of the peace and it contemplated that the justices would command the sheriff to "summon twelve good and lawful men of his said county" together with the tenant in possession. If, upon hearing or on default it appeared to "said jury" that the landlord was entitled to possession, then the justices were to "award restitution of the possession of the said lands" to the landlord and order the sheriff to restore the landlord to possession.

This proceeding continued in the District during the first half of the nineteenth century (*e.g.*, *Lenox v. Arguelles*, 4 D.C. 477, Fed. Cas. No. 8244 (C.C. D.C. 1834)) until a general revision of landlord and tenant law

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[2] Act of Maryland, 1793, ch. XLIII, reprinted in II W. Kilty, *Laws of Maryland* (1800). That statute is reproduced in Appendix B to this brief at p. 1b, below.

was enacted in 1864. 13 Stat. 383. Section 2 of the 1864 Act provided in part that "when possession is held without right" after the lease has been terminated a complaint could be filed by the landlord with the justice of the peace, and if upon trial it appeared that "the complainant is entitled to the possession of the premises he shall have judgment and execution for the possession and costs." 13 Stat. 383-84.[3] The 1864 Act departed from the Maryland statute by providing that the remedy could be used not only in landlord and tenant proceedings but also in any case where a possessor had been forcibly evicted or where a possessor was wrongfully holding the premises by force.

The 1864 Act, in Sections 4-5, provided that either party could appeal to the Supreme Court of the District and it contemplated that in such an appeal either party would be entitled to trial *de novo* by jury. 13 Stat. 384. Indeed, the latter section provided that on trial of the suit in the Supreme Court "if the jury find for complainant, they shall assess the damages and intervening rent." 13 Stat. 384. Accordingly, the tenant could be tried before the justice of the peace alone and yet preserve his right to a jury trial in the District's Supreme Court. *E.g.*, *Luchs v. Jones*, 8 D.C. (1 MacArthur) 345 (D.C. Supreme Ct. 1874). He could not, however, have a jury trial in both forums.[4]

[3]Section 3 of the 1864 Act provided that if the tenant pleaded title to the premises in himself or in a third person under whom he claimed, then on posting of an appropriate bond the proceeding was to be "certified" to the Supreme Court of the District of Columbia. 13 Stat. 384. This accorded with the procedure under the 1793 Maryland statute in which a claim of title by the tenant required resolution in the "next county court." See p. 1b, below.

[4]It is not clear whether landlord and tenant actions were tried by jury in the justice of the peace court after 1864, but debt claims were so tried; and the rule against double jury trials, once before the justice of the peace and once in the Supreme Court, was well established in cases of the latter kind. *E.g.*, *Fitzgerald v. Leisman*, 10 D.C. (3 MacArthur) 6 (D.C. Supreme Ct. 1877).

Through successive revisions, the landlord and tenant proceeding remained basically unchanged during the next half-century. See, *e.g.*, Revised Statutes (relating to the District of Columbia) of 1873-74, §§684-91 (1875); D.C. Code §§20-24 (1901). 31 Stat. 1193.[5] Then, in 1921 the justice of the peace court—which in the interval had been renamed the Municipal Court (35 Stat. 623)—was made a court of record with power to provide jury trials in the full constitutional sense required by this Court's decision in *Capital Traction Co. v. Hof, supra*. 41 Stat. 1310. H.R. Rep. No. 472, 66 Cong., 1st Sess. (1919).[6] Consonantly, *de novo* trial in the Supreme Court of the District was abolished. 41 Stat. 1312.

This was the last major change, so far as landlord and tenant proceedings were concerned, until 1970. In the meantime, the coverage of the statutory eviction proceeding—which had been extended to forcible entries

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[5]The 1901 Code abolished jury trials in the justice of the peace court (§7 (31 Stat. 1191)) in response to this Court's decision in *Capital Traction Co. v. Hof*, 174 U.S. 1 (1899), that the Seventh Amendment required a jury sitting with a judge rather than a justice of the peace. See pp. 37-39, below. It continued to provide for jury trial *de novo* on appeal in the District's Supreme Court. D.C. Code §§30, 80 (1901), 31 Stat. 1194, 1201.

[6]Section 3 of the statute provided: "That hereafter when the value in controversy in any action pending in said Municipal Court shall exceed $20, and in all actions for the recovery of possession of real property, either party may demand a trial by jury. The trial judge shall conduct such jury trial and according to the practice and procedure now obtaining, or as hereafter modified, in the Supreme Court of the District of Columbia, and shall have the same power to instruct juries, set aside verdicts, arrest judgments and grant new trials as said Supreme Court." 41 Stat. 1310-11. The language in the first sentence was evidently designed to embrace all actions where the Seventh Amendment might require a jury trial. The language in the second portion of the second sentence was taken almost verbatim from *Hof*. See 174 U.S. at 39.

and detainers in 1864 and thereafter to possessory disputes arising out of mortgages (D.C. Code § 20 (1901), 31 Stat. 1193)—was ultimately expanded in 1953 to all parties claiming a right to possession of real property against a wrongful occupant. 67 Stat. 66.[7] The name of the trial court was also changed from Municipal Court to Court of General Sessions. 73 Stat. 77.

2. In 1970, Congress enacted the District of Columbia Court Reform and Criminal Procedure Act, which became effective on February 1, 1971. 84 Stat. 473. The new Act retained the eviction proceeding essentially intact except that jurisdiction was transferred from the old Court of General Sessions to the superseding Superior Court of the District of Columbia. In this revision, however, Congress omitted the statutory provision which since 1921 had expressly provided for trial by jury in specified civil actions including "all actions for the recovery of possession of real property." See p. 5, n. 6, above. It did so, as the legislative history reveals, because Congress deemed the statutory guarantee "superfluous in light of constitutional jury trial requirements . . . ." H.R. Rep. No. 91-907, 91st Cong., 2d Sess. 164 (1970).

As the statutory eviction proceeding exists today, it provides the usual mode of trying the right to possession of real property. As original trial jurisdiction has been consolidated in the Superior Court, there is no longer any provision for certifying the case to a different court when a question of title arises in such a proceeding. The court

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[7] Although this expansion eliminated references to particular categories of claimants and parties in possession, including the specific reference to those who forcibly entered or forcibly detained property without right, the statute continued to be captioned in successive codes as relating to "forcible entry and detainer."

by rule has established a landlord and tenant branch which, in the first instance, considers all complaints filed pursuant to the statutory eviction statute.[8]

Procedurally, the statute provides that the tenant must be given at least seven days notice before trial, although the period may often be longer. D.C. Code 16-1501 (Supp. V, 1972). The landlord may claim not only possession of the premises but also seek a judgment for personal property located on them and a money judgment for rent in arrears. Landlord and Tenant Rule 3. However, the money judgment can be obtained only if there has been personal service upon the tenant or if the tenant asserts a counterclaim or a defense of recoupment or set off. *Id.* Conversely, where eviction is sought for nonpayment of rent, the tenant may assert in the eviction proceeding defenses of recoupment or set off or he may counterclaim "for a money judgment based on the payment of rent or on expenditures claimed as credits against rent . . . ." Landlord and Tenant Rule 5(b).

Landlord and Tenant Rule 6 provides that "any party entitled to a jury trial may demand a trial by jury of any action brought in this branch" by timely notice and payment of jury fee, and it provides that any jury case will be tried on an expedited basis.[9] During the period prior to 1971, statutory eviction cases were regularly

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[8] In a replica of the old statutory scheme, the Superior Court's Landlord and Tenant Rule 5(c) provides that the case is to be certified to the Civil Division for trial on an expedited basis if a question of title is raised.

[9] The general civil rules of the Superior Court also provide: "The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by an applicable statute shall be preserved to the parties inviolate." Superior Court Civil Rule 38(a). This provision applies to landlord and tenant proceedings by virtue of Landlord and Tenant Rule 2.

tried to juries. *E.g., Kass v. Baskin*, 82 U.S. App. D.C. 385, 164 F.2d 513 (D.C. Cir. 1947). The adoption of Landlord and Tenant Rule 6, effective February 1, 1971, indicates that it was expected that the same procedure would be followed in eviction proceedings in the new Superior Court.

B. The Proceedings and Decision Below in This Case

1. In May 1971, the petitioner, Dave Pernell, entered into a lease agreement with the respondent, Southall Realty, for the rental of a house in the District of Columbia (R. 53). Pernell, his wife and children moved into the house in the first week of May. Pernell paid Southall $75 towards the first month's rent of $150 per month, and the lease agreement provided that Southall would pay Pernell $300 on condition that Pernell removed certain trash from the premises and made certain specific repairs (R. 53).

On July 20, 1971, Southall filed a complaint in the Superior Court, pursuant to D.C. Code §§16-1501 to 1505 (1967 and Supp. V, 1972), to oust Pernell from possession of the premises (A. 6). The basis for Southall's complaint was Pernell's alleged nonpayment of rent in the amount of $375 (A. 6). Pernell's copy of the complaint showed a demand for back rent allegedly due and for furniture on the premises (R. 55), but these requests were deleted in the copy filed in the court (A. 7). Pernell was required to answer the complaint by August 9, 1971 (A. 7).

On that day, Pernell filed a verified answer (A. 11), money claims of set off and counterclaim (A. 13), and a demand for a jury trial (A. 11). The defenses asserted by the answer were that a valid notice to quit had not been

served nor the right to notice waived; that Southall maintained the premises in an unsafe, unhealthy and unsanitary condition in violation of the District housing regulations and Southall's obligations under the lease agreement; that Southall had breached its agreement to credit improvements made by Pernell against his rent; and that no rent was owing (A. 11). Under District law, as in a number of other jurisdictions, a tenant may defend against eviction proceedings for nonpayment on grounds that the housing regulations have not been complied with and the premises are not being maintained in habitable condition by the landlord. *Javins v. First National Realty Corp.*, 138 U.S. App. D.C. 369, 428 F.2d 1071, *cert. denied*, 400 U.S. 925 (1970); *Brown v. Southall Realty Co.*, 237 A.2d 834 (D.C. Ct. App. 1968).[10]

The set off in the amount of $389.60 represented repairs Pernell asserted that he had made to bring the premises into partial compliance with housing regulations (A. 13). The counterclaim in the amount of $75 was for the recovery of back rent paid while Southall had

[10] In *Javins*, the court held that under the common law in the District and its housing regulations, a lease is to be construed as a contract and, so construed, contains an implied warranty of habitability of the premises measured by the District's housing regulations. Thus "the tenant's obligation to pay rent is dependent upon the landlord's performance of his obligations, including his warranty to maintain the premises in habitable condition. In order to determine whether any rent is owed to the landlord, the tenants must be given an opportunity to prove the housing code violations alleged as breach of the landlord's warranty. . . . At trial, the finder of fact must make two findings: (1) whether the alleged violations existed during the period for which past due rent is claimed, and (2) what portion, if any or all, of the tenant's obligation to pay rent was suspended by the landlord's breach." 138 U.S. App. D.C. at 380-81, 428 F.2d at 1082-83. See also D.C. Housing Regs., §§2902.1(a) and (b), promulgated in Commissioner's Order No. 70-220, June 12, 1970.

maintained the premises in violation of the housing regulations (A. 13). Since Southall's claim for eviction was based upon nonpayment of rent, Pernell was entitled to assert these claims for money judgments in the course of the eviction proceeding. See p. 7, above.

Complying with local rules governing a jury trial, Pernell not only demanded a jury trial in his answer but paid the necessary fees and verified his answer (A. 12); R. 172). On the same day that Pernell filed his answer and appeared with counsel, the trial judge without motion by Southall struck the jury demand *sua sponte* and continued the case for a week (A. 1). The basis for the trial judge's initial action is not entirely clear, but the only support for it is the contention that no constitutional right to jury trial exists in the eviction proceeding.[11]

When counsel for Pernell appeared on the continued date, expecting under the usual motion practice to argue the question whether Pernell was entitled to a jury trial (Landlord and Tenant Rule 13(c)), the trial judge declared that trial to the court would proceed immediately (R. 61). The trial judge refused Pernell's counsel a continuance until the afternoon of the same day or until the next day in order to contact Pernell so that he could be present to testify at the trial (R. 61).

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[11] During the course of the appeal, the trial judge stated that the jury demand had been struck both because the required fee had not been paid and because there was no right to trial by jury (R. 42, 60). The court below, while retaining jurisdiction, remanded the case to the trial court to resolve squarely the question whether the appropriate fee had been paid (R. 162). A hearing was held before the trial judge in which documentary evidence was presented showing that the fee had been paid (R. 168), and the trial judge then certified to the court below that the fee had been paid (R. 172).

The trial judge also rejected counsel's attempted argument that Pernell was constitutionally entitled to a trial by jury under the Seventh Amendment.

At the ensuing trial Southall's agent authenticated the lease agreement (R. 61). He also testified that no rent had been paid since May 1971 and that Pernell had not completed the agreed repairs (R. 61). On cross-examination, counsel for Pernell sought to offer in evidence an official housing code deficiency list for the premises in question issued by the District, listing numerous violations of the housing code (R. 18-21, 62); and he also offered receipts showing expenditures for repairs made by Pernell (R. 17, 62). The court declined to admit any of these documents into evidence on the ground that they were not authenticated or presented by a witness who could be cross-examined (R. 62).[12] Judg-

[12] These documents establish the substance of Pernell's defense to the suit for possession as well as the basis for his set off and counterclaim. Had Pernell been given the opportunity to testify at trial, his testimony would have been substantially the same as his affidavit filed with the court below on appeal in connection with his request for reduced bond pending appeal (R. 14). The affidavit stated in pertinent part:

"[W]hen I first negotiated to lease the subject premises Mr. Southall of Southall Realty informed me that the house had been vacant for over two years and . . . needed substantial repairs. When I first went to the house I found that all the radiators except three were broken . . . . The hot water tank was broken, the roof was leaking seriously, [and] the toilets on both the first and second [floors] were stopped up. . . . The back porch was rotted and in need of major repair. The entire yard as well as the house was full of trash. Mr. Southall told me that I could move in and set off the costs of such repairs against the rent. In addition Mr. Southall agreed in our lease to pay me the sum of $300 for repairing the roof, the back porch and steps . . . and for removing the trash from the premises. In reliance on Mr. Southall's agreement I have spent substantial time and money to repair the house. I have

ment was entered for Southall and Pernell's request for a stay pending appeal was denied (R. 140).

2. On appeal to the Court of Appeals for the District of Columbia, Pernell sought a stay from that court pending disposition of the appeal (R. 1). The court granted a short stay and remanded the matter to the trial judge to fix bond (R. 7). Pernell sought as a reasonable bond one covering the amount of past rent claimed and normal monthly rentals as they became due (R. 9), but the trial judge set bond at $1000 which Pernell was unable to meet (R. 140).[13] On September 3, 1971, Pernell and his family were evicted pursuant to the trial court's judgment.

Thereafter, the constitutional issues sought to be raised in this Court were argued to the court below.[14] On August 31, 1972, the court below filed an opinion holding that under the Seventh Amendment Pernell was not entitled to a jury trial either in defending his right to

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repaired . . . the front porch, the roof and . . . several windows. I also removed three truckloads of trash from the premises. . . . I have spent $389.60 for the purchase of a hot water tank and replacement radiators . . . . Mr. Southall has made no repairs whatsoever to the property . . ." (R. 15).

[13] As Pernell stated in his affidavit filed in the court below in an unsuccessful attempt to persuade that court to reduce bond, he was then working as a furniture mover earning approximately $135 per week in take-home pay. He was the sole support of his wife and three children and had undertaken to support four children of his wife's sister. His bank account then included a balance of approximately $300 (R. 14).

[14] The claim to a jury trial was first asserted in Pernell's answer in the trial court (A. 12), and the constitutional arguments were urged orally to the trial judge. See pp. 10-11, above. On appeal, the constitutional issues were raised in the brief for appellant, pp. 6-22 (R. 78-94), and in the reply brief for appellant, pp. 1-6 (R. 153-58).

possession in the eviction proceeding, or on the money damage claims asserted at the same proceeding (A. 14). The court's lengthy opinion considered a range of historical and precedential arguments but, in essence, rested its decision on a construction of several decisions of this Court (A. 22-24, 28) and on the assertion that neither the statutory eviction proceeding nor claims arising out of a warranty of habitability were known to the common law (A. 17-18, 26-27).

Under District law, compelled eviction of a tenant does not abate his right to regain possession if his eviction is reversed on appeal.[15] In addition, if the decision below is reversed, Pernell will be entitled to pursue his money claims based on set off and counterclaim in the Superior Court in a trial by jury. Reversal of the judgment below will also prevent the judgment of the trial court from having any collateral estoppel effect, which it may otherwise be claimed to have (see p. 52, below), on any claim by Southall for rent which it has alleged as owing by Pernell as the result of his occupancy of the premises.

SUMMARY OF ARGUMENT

The language of the Seventh Amendment shows, and decisions of this Court confirm, that the constitutional standard for trial by jury is basically historical and analytical: the right is preserved where the claim is a "legal" claim that would be tried to a jury under the English common law prevailing when the Seventh Amendment was adopted. *E.g., Parsons v. Bedford*, 28

[15] *Westmoreland v. Weaver Bros., Inc.*, 295 A.2d 506 (D.C. Ct. App. 1972); *Zindler v. Buchanon*, 61 A.2d 616 (D.C. Mun. Ct. App. 1948).

U.S. (3 Pet.) 433 (1830); *Ross v. Bernhard*, 396 U.S. 531 (1970). Where the claim at issue is statutory, the right to a jury trial is determined by whether the new claim finds its closest historical counterpart in claims triable to a jury at common law or falls under a different head of jurisdiction—such as equity—where a jury trial was not available. *E.g., Hepner v. United States*, 213 U.S. 103 (1909); *Luria v. United States*, 231 U.S. 9 (1913). The Seventh Amendment applies with full force to trials in the District of Columbia. *Capital Traction Co. v. Hof*, 174 U.S. 1 (1899); see *Bolling v. Sharpe*, 347 U.S. 497 (1954).

In a proceeding brought by a landlord under the District of Columbia statute here involved, the right asserted is the right to possession and the remedy sought is eviction. Historically, such claims have been tried to juries for over eight centuries in classic common law suits such as novel disseisin, writ of entry, and ejectment. II F. Pollock & F. Maitland, *History of English Law* 47-52 (2d ed. 1968). This Court has repeatedly stated that actions to recover real property are legal actions subject to the Seventh Amendment. *E.g., Whitehead v. Shattuck*, 138 U.S. 146 (1891); *Ross v. Bernhard, supra*. The right to a jury trial is not lost because the action has been simplified through the evolution of the law (see *Parsons v. Bedford, supra*), and the courts have repeatedly applied the Seventh Amendment to claims whose common law lineage was far more remote. *E.g., Meeker & Co. v. Lehigh Valley R.R.*, 236 U.S. 412 (1915); *Olearchick v. American Steel Foundries*, 73 F. Supp. 273 (W.D. Pa. 1947).

So far as prudential considerations may be given weight, the factual issues presented in a landlord and tenant suit are eminently suitable for the common sense judgment of a jury. The severity of the eviction remedy is

a further reason why a jury's intervention is appropriate. Claims that it is not feasible to afford jury trial in statutory eviction proceedings are unpersuasive, even assuming that such arguments could be entertained in the face of the judgment implicit in the Seventh Amendment; not only are juries widely employed in statutory eviction proceedings by numerous states (see, *e.g.*, *Lindsey v. Normet*, 405 U.S. 56 (1972)), but they have been afforded continuously in the District for over 150 years. In 1970 Congress omitted the statutory guarantee on the assumption that it was "superfluous in light of constitutional jury trial requirements . . . ." H.R. Rep. No. 91-907, 91st Cong., 2d Sess. 164 (1970).

Independently, a tenant is entitled to a jury trial under the Seventh Amendment on his claims for money damages asserted in the same District eviction proceeding. The claims here asserted are intrinsically contract claims, and contract claims for money damages are paradigm common law claims triable to a jury. *E.g.*, *Simler v. Conner*, 372 U.S. 221 (1963); 9 C. Wright & A. Miller, *Federal Practice and Procedure* §2316 (1971). The factual issues raised by these claims largely overlap those raised by the landlord's eviction claim, they are no less suitable for jury resolution, and disposition of all such claims in a single proceeding serves the goal of judicial efficiency. See generally *Fitzgerald v. United States Lines*, 374 U.S. 16 (1963).

The contention that *Lindsey v. Normet*, *supra*, supports a denial of jury trial on the tenant's claims for money damages is mistaken. That case, which involved no Seventh Amendment question, held that a state could allow eviction of a tenant and defer his damage claims for trial in a later proceeding; in this case the tenant's claims were permitted by District law in the eviction proceeding, and jury trial attached to those claims under the Seventh

Amendment. Congress has not sought to make the tenant waive his right to jury trial in order to assert money damage claims in an eviction proceeding, and it would be unconstitutional for it to do so since there is here no overriding state interest to justify a burden upon the exercise of a basic constitutional right. See, *e.g.*, *United States v. Jackson*, 390 U.S. 570 (1968); *Sherbert v. Verner*, 374 U.S. 398 (1963).

ARGUMENT

I. UNDER THE SEVENTH AMENDMENT, A RIGHT TO TRIAL BY JURY EXISTS IN THE SUPERIOR COURT WHERE THE HISTORICAL COUNTERPART OR ANALOGUE TO THE CLAIM IN DISPUTE IS A COMMON LAW CLAIM TRIABLE BY JURY.

A. The Constitution Embodies a Historical Standard Which, at Minimum, Entitles a Party to a Trial by Jury Where the Corresponding Claim Was Triable to a Jury Under English Practice in 1791.

The Seventh Amendment provides in pertinent part that "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . ."[16] This language shows--

[16] The Seventh Amendment's requirement that "the value in controversy shall exceed twenty dollars" is readily met in this case and the lower court did not suggest otherwise. It is well established that in actions for repossession of leased premises, the amount in controversy is determined by the rent reserved for the period in question plus the value of any improvements. *Harris v. Barber*, 129 U.S. 366 (1889); *Willis v. Eastern Trust and Banking Co.*, 167 U.S. 76 (1897); *Battle v. Atkinson*, 115 Fed. 384 (C.C. E.D. Ark. 1902), *aff'd*, 191 U.S. 559 (1903). In the present case, the lease required monthly payments of $150 and in its complaint, Southall alleged that Pernell was in default of payment for three months' rent in the amount of $375. See p. 8, above.

and the decisions and commentators confirm—that the constitutional test is basically historical and analytical: the right to jury trial is preserved where a claim at issue in the judicial proceeding corresponds to one triable by a jury under English common law in 1791, when the amendment was adopted, in contradistinction to those cases where a jury trial was not afforded, most importantly, those falling within the equity or admiralty jurisdictions of the courts. *E.g.*, *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433 (1830); *Ross v. Bernhard*, 396 U.S. 531 (1970).[17]

The *locus classicus* of this construction is this Court's opinion in *Parsons v. Bedford, supra*. There, Justice Story stated:

> "By common law [the framers of the Constitution] meant . . . not merely suits, which the common law recognised among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognised, and equitable remedies were administered; or where, as in the admiralty, a mixture of public law, and of maritime law and equity, was often found in the same suit. . . . In a just sense, the amendment then may well be construed to embrace all suits, which are not of equity and admiralty jurisdiction, whatever may

[17] See generally 5 W. Moore, *Federal Practice* para. 38.08[5], at 80-81 (2d ed. 1971) (hereafter "Moore"); F. James, *Civil Procedure* §8 (1965) (hereafter "James"); 9 C. Wright & A. Miller, *Federal Practice and Procedure* §2302 (1971) (hereafter "Wright & Miller"). Although the amendment "preserves" rather than establishes the right in all such suits, the difference is rarely significant. Trial by jury existed in almost all common law proceedings with a few notable exceptions such as habeas corpus, bankruptcy and suits against the state. See Moore para. 38.08[5], at 85.

be the peculiar form which they may assume to settle legal rights." 28 U.S. (3 Pet.) at 447.

See also J. Story, *Commentaries on the Constitution of the United States* 654-56 (L. Levy ed. 1970). The governing distinction has been followed in numerous subsequent cases (*e.g.*, *Insurance Co. v. Comstock*, 83 U.S. (16 Wall.) 258 (1872); *United States v. Louisiana*, 339 U.S. 699 (1950)), and the passage was recently quoted and cited with approval in *Ross v. Bernhard*, 396 U.S. at 533, where the minority opinion also adopted the historical standard but disagreed about its application to the particular claims. 396 U.S. at 543-44.

Indeed, the only recent controversies arising from the application of this standard relate to cases where, as in *Ross v. Bernhard*, the merger of law and equity has created new situations not likely to have been faced under the old dual procedure. The problems have arisen, typically, where a claim or aspect of it would arguably have been deemed equitable under the old classifications but is now entangled with legal claims or is susceptible to legal resolution under the merged procedure.[18] No such difficulty is presented in this case; it was never suggested by the lower court that the claims here in issue fall, in whole or in part, within the jurisdiction of equity.

These recent decisions do, however, illustrate a principle of long standing in the application of the

[18] In *Beacon Theatres v. Westover*, 359 U.S. 500 (1959), the question was one of priority of trial where both legal and equitable claims were presented in the same proceeding. *Dairy Queen v. Wood*, 369 U.S. 469 (1962), involved a claim that, under the merged procedure, could be deemed akin either to a legal claim (a damage action) or an equitable claim (an action for accounting). *Ross v. Bernhard* presented the anomoly of a dual claim which, judged by historical standards, involved both legal and equitable aspects.

Seventh Amendment, namely, that all doubts are to be resolved in favor of jury trial. See, *e.g., Scott v. Neely*, 140 U.S. 106, 109-10 (1891); *Beacon Theatres v. Westover, supra,* 359 U.S. at 510. This comports with the history of the Seventh Amendment which is animated by concern for the importance of jury trial. It is a familiar fact that the absence of a civil jury guarantee in the original Constitution led several states to the brink of withholding an unconditional ratification and spurred adoption of the Bill of Rights by the first Congress.[19]

Consonantly, from the early decisions onward, this Court has emphasized that "the trial by jury is justly dear to the American people" and has "always been an object of deep interest and solicitude . . . ." *Parsons v. Bedford, supra,* 28 U.S. (3 Pet.) at 446. More recently, the Court stated that a "right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts." *Jacob v. New York City*, 315 U.S. 752-53 (1942). This emphasis has been repeatedly applied in characterizing disputed claims as legal (*e.g., Parsons v. Bedford, supra; Dairy Queen v. Wood, supra*), as well as in other matters such as determining the priority of trial where legal and equitable claims both appear. *Scott v. Neely, supra; Beacon Theatres v. Westover, supra.*

B. Where the Claim at Issue Has Been Incorporated in a Statute or Otherwise Altered by the Development of the Law, It Is Subject to Jury Trial If Its Closest Historical Analogue Is an Action Triable to a Jury at Common Law.

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[19] See *Colgrove v. Battin*, ___ U.S. ___ (1973); *Slocum v. New York Life Ins. Co.*, 228 U.S. 364, 377-87 (1913); Henderson, "The Background of the Seventh Amendment," 80 *Harv. L. Rev.* 289 (1966).

The claims advanced by litigants in the courts have been undergoing change in both their substantive and procedural aspects ever since the ancient writs established the earliest "forms of action." See F. Maitland, *The Forms of Action at Common Law* (1962 ed.) (hereafter "Maitland"). Yet it is well settled that the Seventh Amendment applies to suits which adjudicate legal rights and remedies whether or not such modifications have been adopted. As Justice Story pointed out in *Parsons v. Bedford, supra,* at the very time the Seventh Amendment was adopted "probably, there were few, if any, states in the Union, in which some new legal remedies, differing from the old common-law forms, were not in use; but in which, however, the trial by jury intervened, and the general regulations in other respects were according to the course of the common law." 28 U.S. (3 Pet.) at 447.

While certain of the changes have reflected the evolution of judge-made law, many claims have now been altered by or embodied in statutes. This Court has always applied the Seventh Amendment in such cases by determining whether the statutory claim found its closest historical analogue in a legal claim triable to a jury at common law.[20] The same standard has been employed by the lower federal courts and supported by the commentators.[21]

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[20] *E.g., Luria v. United States*, 231 U.S. 9, 27-28 (1913); *Crowell v. Benson*, 285 U.S. 22, 45 (1932); *Beacon Theatres v. Westover*, 359 U.S. 500, 510 (1959); *Dairy Queen v. Wood*, 369 U.S. 469, 477 (1962).

[21] *Simmons v. Avisco*, 350 F.2d 1012, 1018 (4th Cir. 1965); *Dasho v. Susquehanna Corp.*, 461 F.2d 11 (7th Cir.), *cert. denied*, 408 U.S. 925 (1972); *Brady v. Trans World Air Lines, Inc.*, 196 F. Supp. 504, 507 (D. Del. 1961); *United States v. Jepson*, 90 F. Supp. 983, 986 (D. N.J. 1950); 5 Moore para. 38.11[7]; James §8.6; Wright & Miller §2316, at 79.

For example, in *Hepner v. United States, supra,* this Court recognized that trial by jury was guaranteed where the United States brought an action, corresponding to a common law action of "debt," to collect a civil penalty established by statute. 213 U.S. at 115. Conversely, in *Luria v. United States, supra,* the Seventh Amendment was held inapplicable to a statutory proceeding to cancel a naturalization certificate on grounds of fraud, since the Court analogized the proceeding to one cognizable in equity under traditional practice. 231 U.S. at 27-28. With increasing codification it seems probable that most actions presenting federal questions have, at least since *Erie v. Tompkins,* 304 U.S. 64 (1938), involved federal statutory claims.

In applying the test of historical analogy, this Court has looked to the pre-merger custom both as it related to the right involved and to the nature of the remedy sought. See *Ross v. Bernhard, supra,* 396 U.S. at 533, 538.[22] While there are areas of overlap, different rights and remedies have historically been associated with legal and equitable claims respectively in a number of fields. As *Ross v. Bernhard* explained:

> "However difficult it may have been to define with precision the line between actions at law dealing with legal rights and suits in equity dealing with equitable matters . . . some proceedings were unmistakably actions at law triable to a jury. The Seventh Amendment for example, entitled the parties to a jury trial in actions for damages to a

[22] The dissenting opinion in *Ross v. Bernhard*, while disagreeing about the application of the historical standard to the case at hand, stated that "where a new cause of action is created by Congress, and nothing is said about how it is to be tried, the jury trial issue is determined by fitting the cause into its nearest historical analogy." 396 U.S. at 543 n. 1.

person or property, for libel and slander, for recovery of land, and for conversion of personal property." 396 U.S. at 533 (footnote omitted).

Where a statute explicitly classifies a claim as triable to a jury, of course a jury trial will automatically be provided since Congress is free to employ this method even where it is not required by the Seventh Amendment. See *Fitzgerald v. United States Lines*, 374 U.S. 16 (1963).[23] Where the constitutional question is squarely presented, as when Congress has failed to specify the mode of trial, naturally the courts must decide whether the claim is one subject to the constitutional guarantee of jury trial. Ultimately, of course, this Court is the final arbiter of the question whether a constitutional right applies. See, *e.g.*, *Katzenbach v. Morgan*, 384 U.S. 641, 651 n. 10 (1966); *Trop v. Dulles*, 356 U.S. 86, 94-96 (1958).

C. The Seventh Amendment Applies With Full Force and Effect in the District of Columbia Courts Established by Act of Congress.

The District of Columbia Government, and its agencies and its courts are creatures of the Federal Government and are, accordingly, constrained by the guarantees of the Bill of Rights. Thus, this Court stated in *Capital Traction Co. v. Hof, supra,* that "it is beyond doubt, at the present

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[23] There are numerous federal statutes which provide a right to a trial by jury. See 5 Moore para. 38.12. Certain of these provisions extend the right to jury trial where it would not otherwise apply, as in certain condemnation proceedings. *Id.* para 38.12[5]. In still other cases—such as suits to forfeit articles seized on land—various statutes provide a right of trial by jury even though it would exist in the absence of any statutory provision. *Id.* para. 38.12[7], at 135.

day, that the provisions of the Constitution of the United States securing the right of trial by jury, whether in civil or criminal cases, are applicable to the District of Columbia." 174 U.S. at 5 (Seventh Amendment). *Accord, Callan v. Wilson*, 127 U.S. 540, 550 (1888) (Sixth Amendment). The governing principles were summarized in the decision in *Curry v. District of Columbia*, 14 App. D.C. 423 (D.C. Ct. App. 1899), rendered not long after *Callan* and *Hof*:

> "The power of Congress in the District of Columbia, as elsewhere throughout the Federal Union, is distinctly limited by all the express guaranties of individual right contained in the Federal Constitution. No more in the District of Columbia than anywhere else within the United States could the legislature of the Union pass a bill of attainder or an *ex post facto* law, or dispense with trial by jury, or establish a religion, or authorize unreasonable searches." *Id.* at 439.

The Superior Court of the District of Columbia is not, of course, an Article III court. In this respect it is similar to the territorial courts, established by Congress in the western territories prior to their statehood, whose proceedings were equally subject to the Seventh Amendment. *E.g., Thompson v. Utah*, 170 U.S. 343, 346 (1898). As this Court explained in *Minneapolis & St. L. R.R. v. Bombolis*, 241 U.S. 211, 219 (1916), "although territorial courts of the United States are not constitutional courts, nevertheless as they are courts created by Congress and exercise jurisdiction alone by virtue of power conferred by the law of the United States, the provisions of the Seventh Amendment are applicable in such courts."

This Court has similarly held that the Bill of Rights guarantees are directly applicable to the District of

Columbia Government in other contexts. For example, in *Bolling v. Sharpe*, 347 U.S. 497 (1954), it was held that the District of Columbia school system—although not subject to the Fourteenth Amendment's guarantee of equal protection—was directly subject to the Fifth Amendment's due process clause which embodied comparable protection against racial discrimination. Consonantly, in *Public Utilities Commission v. Pollack*, 343 U.S. 451 (1952), the Court deemed a District of Columbia regulatory agency subject to the constraints of the First Amendment.

But for the direct application of the Bill of Rights, the District of Columbia's citizens would be bereft of basic constitutional guarantees in their relations with their local agencies and courts. For, the District of Columbia is not a state for purposes of the Fourteenth Amendment (*Bolling v. Sharpe, supra*, 347 U.S. at 499) nor does it have the benefit of a local bill of rights comparable to those in state constitutions. The District of Columbia courts have long acknowledged that the Bill of Rights guarantees apply directly to the District (see, *e.g.*, *Curry v. District of Columbia, supra*), and the lower court's decision in the present case rested directly upon the Seventh Amendment.

II. A JURY TRIAL MUST BE AFFORDED UNDER SEVENTH AMENDMENT STANDARDS IN A STATUTORY EVICTION PROCEEDING WHICH DETERMINES THE RIGHT TO POSSESSION OF REAL PROPERTY AND PROVIDES A REMEDY OF EVICTION.

A. The Closest Historical Analogues of the Statutory Eviction Proceeding Are Long Standing Common Law Actions Which Included a Right to Trial by Jury.

The statutory eviction proceeding here at issue is designed to determine the right to possession of real property, and it provides a remedy of eviction for the landlord where the tenant is found to be wrongfully in possession. It cannot be fairly disputed that the historical counterparts or closest historical analogues of such a proceeding are the several common law actions used to recover possession of real property. These actions, which are virtually classic examples of common law actions, were all triable to a jury both in origin and at the time the Seventh Amendment was adopted.

Most notable among the classic possessory actions, which developed to supplement still older real actions directed at determining title, are three which are particularly relevant to this case: the assize of novel disseisin, the writ of entry, and the action in ejectment.[24]

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[24] See generally Maitland 27-29, 39-42, 57; T. Plucknett, *A Concise History of the Common Law* 358-62, 373-74 (5th ed. 1956) (hereafter "Plucknett"); *Urciolo v. Evans*, 99 D.W.L.R. 1729 (D.C. Superior Ct. 1971) (reported in part). The *Urciolo* opinion summarizes the historical materials and applies them directly to the statutory eviction proceeding at issue in this case. The court below,

Although varying in many respects, the basic thrust of each of these three forms of action was to try the right of possession to real property. Thus, novel disseisin—which is one of the earliest of the old writs and dates back to the twelfth century—came into being *solely* to restore possession to one wrongfully ousted from it, and the plea of title would not even be considered as a defense. Maitland 28; Plucknett 358-59.[25] The writ of entry, which developed in the thirteenth century, was in one respect even closer to the present case, since one of its recorded variations—the writ of entry *ad terminum qui praeterit*—"lay to recover lands against one who held them originally for a term of years, which term had expired." Plucknett 362 (footnote omitted); Maitland 39.

Lastly, ejectment, emerging as a variant of trespass on the case in the fifteenth century, provided a counterpart remedy: in its origins it was designed to restore a term tenant, wrongfully dispossessed from his land, to possession of it. Maitland 47-48; Plucknett 373-74. The office of ejectment ultimately was enlarged to the point that, by the mid-nineteenth century, ejectment had become the usual method of trying the right to possession under practically all circumstances. Plucknett 373-74. However, the other forms of action remained available in England until the late nineteenth century when they were abolished by Parliament. *Id.*

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while disagreeing with *Urciolo*'s ultimate conclusion that jury trial attached in an eviction proceeding, described the opinion as scholarly and took no exception to its historical analysis (A. 20, 22). A copy of the full opinion is attached to the petition for certiorari in this case.

[25] This Court has several times noted the emphasis on the right to possession, as opposed to title, in novel disseisin. See *Grant Timber & Mfg. Co. v. Gray*, 236 U.S. 133, 134 (1915); *Lindsey v. Normet*, 405 U.S. 56, 68 n. 14 (1972).

The other dominating characteristic of these three proceedings is that in each one trial by jury was employed to determine the right to possession. In novel disseisin, the use of the jury was obligatory—a direction to summon the jury was part of the original writ—as was true of the 1793 Maryland statute first adopted in the District. See p. 3, above.[26] In entry and in ejectment, the jury was demandable as of right although, as in modern practice, the parties were free to dispense with it. See Maitland 39; Plucknett 130.

In light of this lineage, it is not surprising that this Court and the commentators have uniformly regarded actions to recover possession of real property as legal actions par excellence for which a jury trial is guaranteed by the Seventh Amendment. For example, in *Scott v. Neely*, 140 U.S. 106, 110 (1891), the Court stated:

"All actions which seek to recover specific property, real or personal, with or without damages for its

[26] Maitland 27. Maitland reprints a sample writ, translated as follows:

"The King to the sheriff greeting. A hath complained unto us that X unjustly and without judgment hath disseised him of his freehold in Trumpington after (the last return of our lord the king from Brittany into England). And therefore we command you that, if the aforesd A shall make you secure to prosecute his claim, then cause that tenement to be reseised and the chattels which were taken in it and the same tenement with the chattels to be in peace until the first assize when our justices shall come into those parts. And in the mean time you shall cause twelve free and lawful men of that venue to view that tenement and their names to be put into the writ. And summon them by good summoners that they be before the justices aforesd at the assize aforesd, ready to make recognizance thereupon. And put by gages and safe pledges the aforesd X or, if he shall not be found, his bailiff, that he be then there to hear that recognizance. And have there the (names of the) summoners, the pledges, and this writ." *Id.* 83-84 (footnotes omitted).

> detention, or a money judgment for breach of a simple contract, or as damages for injury to person or property, are legal actions, and can be brought in the Federal courts only on their law side."

Later in the same term, the Court employed similar language in *Whitehead v. Shattuck*, 138 U.S. 146 (1891), in holding that an equitable action to recover real property was not permitted where ejectment provided an adequate remedy at law. Citing and quoting from earlier decisions, the Court explained that such a general rule was necessary "because the defendant has a constitutional right to trial by jury." *Id.* at 151. More recently, in *Ross v. Bernhard, supra,* this Court cited *Whitehead* for the proposition that the Seventh Amendment entitled parties to a jury trial in actions *inter alia* "for recovery of land." 396 U.S. at 533.

Precisely the same view has been taken by the commentators. Thus Wright & Miller state that "it is clear, for example, that there is a right to jury trial in actions . . . for recovery of land . . . ." § 2316, at 77. The lower federal courts follow the same view. Especially pertinent is *National Life Ins. Co. v. Silverman*, 454 F.2d 899 (D.C. Cir. 1971), since the proceeding in question was brought under the District's statutory eviction proceeding to recover possession of a hotel. With respect to the claim for possession, the court held that the Seventh Amendment entitled the possessor to a trial by jury, citing the *Whitehead* decision. *Id.* at 906.

The lower court in this case sought to draw distinctions between the older forms of action described above and the present statutory eviction proceeding. It said, for instance, that title was always involved, "at least conceptually," in actions in ejectment (A. 18). This certainly would not distinguish novel disseisin, where title was irrelevant (p. 26, above), and it is not even accurate

as applied to ejectment. As previously noted, ejectment originated as an action brought by the tenant—who by definition had no title—to protect him against a wrongfully dispossessing landlord, who admittedly had title. P. 26, above. In its mature form, "the purpose of ejectment at common law has always been primarily to determine the question of the right to possession, and secondarily the question of title, if that question be raised . . . ." *Shapiro v. Christopher*, 90 U.S. App. D.C. 114, 122, 195 F.2d 785, 793 (1952). In this respect it is precisely comparable to the statutory eviction proceeding employed in the District.[27]

The court below also implied that the "summary" character of the statutory eviction proceeding is a basis for distinguishing the older forms. This label is dubious as applied to the statutory eviction proceeding,[28] and even if accurate it would not provide a ground of distinction: novel disseisin "was, according to the notions of the time, and it would be even according to our own notions, a summary action." II F. Pollock & F. Maitland, *History of English Law* 48 (2d ed. 1968) (hereafter "Pollock & Maitland"); Maitland 29. In any event, there is nothing whatever inconsistent between summary procedures—*e.g.*, the narrowing of issues to be litigated, the use of

[27] There is no dispute that the question of title may be injected in a statutory eviction proceeding in the District. Under the older statutes, the proceeding was continued in a different court when an issue of title was raised, and today the title question can be resolved in the same court. See pp. 4, 7, above.

[28] In such a proceeding, the landlord can recover not only his real property but also furniture and past rent. The tenant can litigate not only the issue of nonpayment of rent but also defenses based on the landlord's lack of title, his violation of housing regulations, and his failure to maintain the premises in habitable condition. See pp. 4, 7, above.

expedited scheduling—and the provision of trial by jury. See *443 Cans of Frozen Egg Product v. United States*, 226 U.S. 172, 183 (1912); *Lindsey v. Normet*, 405 U.S. 56, 63 (1972).

Finally, the lower court suggested that the present statutory eviction proceeding cannot be akin to common law ejectment because there is a little used statutory proceeding for ejectment for nonpayment of rent contained in D.C. Code §16-1124 (1967). In fact, this so-called "ejectment" proceeding for nonpayment of rent is not, strictly speaking, common law ejectment but is derived directly from a British statute passed in 1731 which, in significant respects, was designed to streamline the proceedings for recovery of property for nonpayment of rent by a tenant. Compare D.C. Code §16-1124(a) (1967) with 4 Geo. 2, ch. 28, §2 (reprinted in relevant part following §16-1124). See also *Connor v. Bradley*, 42 U.S. (1 How.) 211 (1843). The statutory eviction proceeding is no less a modernized descendent of common law actions than D.C. Code §16-1124 itself.[29]

Even if the various distinctions sought to be drawn by the lower court were accurate, which they are not, they would have little relevance to the Seventh Amendment question presented in this case, and the lower court's reliance upon such distinctions shows rather that it has fundamentally misconceived the governing constitutional standard. Few statutory proceedings are identical in every detail to the common law actions they replace or modify, or else the statute would be unnecessary. For Seventh Amendment purposes, the decisive point is that both the

[29] As the *Connor* case shows, even in its revised form this new proceeding was cumbersome. 42 U.S. (1 How.) at 217-18. This undoubtedly explains why, as the statutory history in the District shows, further simplifications to achieve the present statutory eviction proceeding were introduced and the simplified procedure extended to an ever-increasing class of cases. See pp. 5-6, above

right at issue in the District's statutory eviction proceeding—the right to possession of real property—and the remedy sought—eviction—find direct counterparts in common law actions where trial by jury has long been assured. It is these fundamental similarities that are controlling and not variations in matters of form and procedure.

The principle that the Seventh Amendment is directed to the fundamental nature of the claim and not to the transient forms or procedures which may be employed has been repeated by this Court and the lower federal courts on numerous occasions ever since *Parsons v. Bedford*. See pp. 20-21, above. Statutory proceedings far less familiar to the common law than eviction suits have been recognized as sufficiently analogous to common law actions to require trial by jury.[30] The approach taken by the lower court is not only inconsistent with decisions of this Court so interpreting and applying the Seventh Amendment for over 150 years but, in a period of procedural evolution and increasing codification of substantive law, the lower court's approach would render the Seventh Amendment virtually an anachronism.

B. Prudential Considerations Also Support the Provision of Jury Trial in Statutory Eviction Proceedings.

In addition to the historical and analytical standards already discussed, reference has occasionally been made

[30] *E.g.*, *Dairy Queen v. Wood*, *supra* (statutory trademark action for damages); *Meeker & Co. v. Lehigh Valley R.R.*, 236 U.S. 412, 430 (1915) (reparation action under the Interstate Commerce Act); *Simmons v. Avisco*, 350 F.2d 1012 (4th Cir. 1965) (damage suit for violation of Labor-Management Reporting and Disclosure Act); *Martin v. Detroit Marine Terminals, Inc.*, 189 F. Supp. 579 (E.D. Mich. 1960) (suit for overtime compensation under the Fair Labor Standards Act).

to "the practical abilities and limitations of juries" in determining whether an issue is "legal" for Seventh Amendment purposes. See *Ross v. Bernhard, supra,* 396 U.S. at 538. Since the Seventh Amendment standards have always been deemed essentially historical and analytical, this consideration could not operate to deny a defendant a right to a trial by jury where, as here, the claim at issue found its direct counterparts in actions triable to a jury at common law. See James §8.11. However, in this instance such practical considerations do not detract from but strongly support the proposition that the statutory eviction proceeding here at issue is subject to a jury trial.

The factual issues presented in this case and in the typical eviction proceeding are preeminently suitable for a jury's disposition. Judged by the limited number and the simplicity of the contested issues, such eviction proceedings are vastly more fit for a lay jury than highly complex securities, antitrust, and other commercial controversies routinely submitted to juries in federal courts.[31] And, judged by the severe social consequences of an eviction, the use of the jury is certainly more appropriate in an eviction proceeding than in practically any other civil case that comes to mind. See p. 35, below.

In the present litigation, the central question was whether Pernell was liable to eviction for nonpayment of

[31] See, *e.g., Dairy Queen v. Wood, supra; Beacon Theaters v. Westover, supra; Dasho v. Susquehanna Corp., supra. Beacon Theaters*, for example, involved claims by the plaintiff for declaratory relief presenting issues under the Sherman Act and Clayton Act as they applied to the practices of distributing first run motion pictures. The defendant filed a counterclaim against the plaintiff and a cross claim against an intervening party, it charged a conspiracy existed to manipulate contracts and clearances, and it demanded treble damages. 359 U.S. at 502-03.

rent. Southall contended that Pernell had made no rental payments for several months and had not undertaken any repairs which would entitle him to credit against his rent. See p. 11, above. It was Pernell's position that Southall had agreed that he could set off the cost of repairs against his rent, that he had made numerous repairs and expended $389.60 for the purchase of necessary items, and that Southall had in addition to the credit against rent agreed to pay $300 to Pernell for making these specified repairs himself. See pp. 9, 11-12, above.[32] Pernell also contended that the landlord had not complied with District housing regulations requiring a habitable residence so that under *Javins* his obligation to pay rent was proportionately abated. See pp. 9, 11-12, above.[33]

What rent had been paid by the tenant, what agreement had been reached between him and his landlord, and what repairs had been made by either party are elementary questions of fact readily determined by a jury. Whether the premises were decently maintained by the landlord, consistent with the District's housing regulations, is equally an appropriate question for the sensible judgment of jurors residing in the same com-

[32] The promise of the $300 payment is recorded in the lease (R. 53). The asserted promise of the landlord to credit the cost of repairs against lease payments was oral and would have been testified to by Pernell. The expenditures depend both on oral and documentary evidence; receipts for expenditures were tendered to the trial court but refused for lack of an authenticating witness (R. 17, 62).

[33] Southall's failure to maintain the premises in habitable condition could not have been excused by assuming that the burden of repairs was shifted to Pernell. Quite apart from the question whether the obligation can be delegated, Pernell only agreed to make several specific repairs (R. 53); he asserted that he did make those repairs but offered evidence to show that more was necessary to render the premises habitable. See pp. 11-12, above.

munity. Habitability does not turn on highly technical violations of the housing regulations. The question under the governing decision in *Javins* is whether a decent and habitable dwelling has been maintained by the landlord, giving due regard to the requirements of the regulations.[34] It would be difficult to find questions of fact and factual inference that better invoke the fundamental assumptions on which jury trial is based. This Court has observed that the purpose is to assemble men who represent "the average of the community" who "sit together, consult, apply their separate experience of the affairs of life to the facts proven." *Railroad Company v. Stout*, 84 U.S. (17 Wall.) 657, 664 (1874). The Court continued:

> "This average judgment thus given it is the great effort of the law to obtain. It is assumed that twelve men know more of the common affairs of life than does one man, that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge." *Id.*

The jury is appropriate in an eviction proceeding for yet another reason. The tenant's home, by providing protection for him and his family, supplies one of the most fundamental wants in society. In *Shapiro v.*

[34] *Javins* determined that the common law, as it has evolved, imposes on a landlord an obligation to keep his premises in "a habitable condition" (138 U.S. App. D.C. at 375, 428 F.2d at 1077) and the decision points out that this obligation was re-confirmed by the District's housing regulations' broad requirement that premises "be maintained and kept in repair so as to provide decent living accommodations for the occupants." *Id.* at 379, 428 F.2d at 1081. *Javins* expressly held that "the jury should be instructed that one or two minor violations standing alone which do not affect habitability are *de minimis* and would not entitle the tenant to a reduction in rent." *Id.* at 380 n. 63, 428 F.2d at 1082 n. 63.

Thompson, 394 U.S. 618, 627 (1969), this Court described shelter as one of "the very means to subsist," and the importance of achieving and safeguarding adequate lodgings has been repeatedly recognized in a variety of contexts.[35] The wrongful ouster of a family may have consequences that are scarcely less severe than a wrongful criminal conviction. When juries can be freely had in the most rarified commercial disputes between corporations, it would be curious and disturbing to conclude that a jury should be denied in a proceeding which may cost a man his home.

While agreeing that Seventh Amendment questions cannot be resolved on the basis of "caseloads, statistics, or expedients" (A. 29), the court below suggested that jury trials in eviction proceedings might result in a flood of prolonged cases (A. 29). There is no basis for this suggestion. The vast majority of landlord and tenant cases filed each year in the District are settled by the payment of rent or surrender of the premises without any trial at all, and jury demands are made only in a small minority of cases.[36] Since juries have been available in statutory eviction proceedings in the District of Columbia from 1801 until the decision below, it is particularly farfetched

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[35] *E.g.*, *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Escalera v. New York Housing Authority*, 425 F.2d 853 (2d Cir. 1970); *Javins v. First National Realty Corp.*, *supra*; Housing Act of 1949 §1, 42 U.S.C. §1441 (1970); Housing and Urban Development Act of 1968, 12 U.S.C. §1701 (1970); D.C. Housing Regs. §2910 (1956); President's Committee on Urban Housing, *A Decent Home* 1, 47-48 (1968); National Commission on Urban Problems, *Building the American City* 1-10 (1968).

[36] In *Tutt v. Doby*, 148 U.S. App. D.C. 171, 176, 459 F.2d 1195, 1200 (1972), the court estimated that no more than three percent of proceedings begun to evict tenants ever went beyond the threshold stage.

to assert that this practice, now over a century and a half old, could frustrate the operations of a court.

What is more, many states expressly provide for trial by jury in summary eviction proceedings.[37] Merely as an example, the Oregon statutory eviction proceeding scrutinized in *Lindsey v. Normet, supra,* explicitly provided for trial by jury, even though the proceeding was far more summary and narrow than the proceeding at issue in this case. See 405 U.S. at 61 n. 3. If states as diverse as Arizona and Illinois and Oregon afford jury trials in statutory eviction proceedings, without any compulsion from the Seventh Amendment, it cannot be beyond the ability of the District of Columbia courts to do so. The courts are not without tools to expedite cases even where jury trials are involved. See, *e.g.,* D.C. Superior Court Civil Rule 38-I (providing for six-man juries).

The denial of a jury trial to tenants in the statutory eviction proceeding would be especially anomalous because the landlord, if he wished to do so, could readily secure a jury trial. As previously noted, D.C. Code §16-1124 (1967) embodies an alternate procedure, more cumbersome and therefore little used, for recovery of property for nonpayment of rent. See p. 30, above. The

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[37] *E.g.,* Arizona: Ariz. Rev. Stat. Ann. §12-1176 (1956); Colorado: Colo. Rev. Stat. Ann. R. Civ. P. 38(a) (1970); Georgia: Ga. Code Ann. §§61-304, 105-1601-02 (1966); Illinois: Ill. Rev. Stat. ch. 57, §11a (1971); Indiana: Ind. Stat. Ann. §32-7-3-4, §32-7-3-12 (Burns Code Ed. 1973); California: Cal Code Civ. Pro. §1171 (West 1972); Connecticut: Conn. Gen. Stat. Rev. §51-266, §52-463 (1968); Kansas: Kan. Stat. Ann. §61-2309 (1972 Supp.); Kentucky: Ky. Rev. Stat. Ann. §383-210 (1969); Michigan: Mich. Stat. Ann. §27A.5738 (1973 Supp.); New York: N.Y. Real Prop. Actions §745 (McKinney 1963); Ohio: Ohio Rev. Code Ann. §1923.10 (Page 1968); Oregon: Ore. Rev. Stat. §§105.130, 150.150 (1971).

lower court acknowledged a jury trial might well be available in that proceeding (A. 17). Theoretically, under the lower court's decision, the landlord could choose between two statutory remedies, each of which would adjudicate the right to possession and permit eviction, but one would entitle the landlord to demand a jury trial and the other would foreclose the tenant from doing so. Compare *Dairy Queen v. Wood, supra,* 369 U.S. at 477-79.

C. The Decisions of This Court Relied Upon by the Lower Court Do Not Support Its Position.

The lower court, in rejecting Pernell's claim to a jury trial on the issue of right to possession, relied importantly on several decisions of this Court. The decision most heavily emphasized was *Capital Traction Co. v. Hof, supra,* decided by the Court in 1899. In the *Hof* case, this Court held—in a damage action brought against a traction company—that jury trial before a justice of the peace was not sufficient to comply with the Seventh Amendment. *Hof* established that the Constitution's guarantee of a jury trial required a jury trial before a full-fledged judge qualified to instruct the jury in matters of law. 174 U.S. at 18.

The court below here reasoned that because *Hof* determined in 1899 that a jury trial before a justice of the peace was not sufficient to comply with the Seventh Amendment, the use of that procedure between 1801 and 1864 in District eviction proceedings shows that those proceedings were not subject to the Seventh Amendment (A. 22-23).[38] Patently, this is a *non sequitur.*

[38] The lower court stated that in its view "*Hof* shatters the picture of a continuous history of jury trials protected by the seventh amendment in summary landlord-tenant possession cases"

What *Hof* shows is that judged by a requirement announced in 1899, the District's procedure from 1801 to 1864 may have been deficient in failing to provide a judge *in addition to a jury* in the eviction proceedings. There is no reason to doubt that Congress in maintaining a justice of the peace court with authority to hold jury trials acted on the misapprehension—corrected many years later in *Hof*—that such trials did comport with the Seventh Amendment.[39]

and the decision "makes it clear" that until the 1864 statute providing for a jury trial in the Supreme Court of the District, "no right to a jury trial within the contemplation of the Constitution was available to the parties to such actions" (A. 23).

[39] When in 1823 Congress extended the authority of the justice of the peace court to recovery of debts exceeding $20, it explicitly provided that "in every action to be brought by virtue of this act, where the sum demanded shall exceed twenty dollars, it shall be lawful for either of the parties to the suit, after issue joined, and before the justice shall proceed to inquire into the merits of the cause, to demand of the said justice that such action be tried by a jury." 3 Stat. 746. The statute went on to provide that the justice should summon jurors subject to the normal qualifications established by District law, that the jurors might be challenged and the challenges disposed of by the justice, that the jury should be sworn, and that the justice should give judgment in accordance with the jury's verdict. *Id.*

Moreover, as this Court's decision in *Hof* observed, the early cases in the District of Columbia courts "would appear, by the brief notes of them in the reports of Chief Justice Cranch, to have proceeded upon the assumption that the trial before a justice of the peace, by a jury empanelled pursuant to the Act of 1823, was a trial by jury within the meaning of the Seventh Amendment to the Constitution . . . ." It was from these early cases (*e.g., Davidson v. Burr*, 2 Cranch C.C. 515 (1824)) that there developed the rule averted to above (see p. 4) that one could not secure a jury trial in both the justice of the peace court and in the Supreme Court on review *de novo*; for this would have meant that the verdict of a jury was being re-examined contrary to the second clause of the Seventh Amendment. See 174 U.S. at 39-40.

The assertion in the lower court's opinion that the historical chain of jury trial in the District has been broken is not only based on a misreading of *Hof* but is, moreover, beside the point. The ultimate question under this Court's decisions construing the Seventh Amendment is whether the present proceeding corresponds closely to common law actions tried to a jury and the overwhelming evidence is that it does. This kinship, which would exist even without regard to the intervening events, is simply illuminated and emphasized by the fact that a jury trial has been afforded continuously in eviction proceedings in the District under the adopted Maryland statute, under the superseding District statute enacted in 1864, and under the succeeding codes and statutes in the District in force into this decade.

The other jury trial decision of this Court principally relied upon by the court below on this aspect of the case is *Block v. Hirsh*, 256 U.S. 135 (1921). There this Court held *inter alia* that the Seventh Amendment right of jury trial was not abridged by a wartime statute giving tenants in the District a right to remain in possession after expiration of their lease at a "reasonable rental" and confiding the determination of what was reasonable to an administrative commission, subject to judicial review. The lower court here concluded that if no jury trial was required in these circumstances, it could not be required in the statutory eviction proceeding under the District's present law (A. 24).

Hirsh accords with and is explained by the principle that Congress may, consistent with the Seventh Amendment, establish totally new substantive rules of public law and entrust their administration to commissions and agencies. In *Hirsh* Congress sought to meet a wartime emergency shortage of housing in the District by abrogating the landlord's right to evict his tenant after the

lease expired, and it substituted temporarily a right to hold over subject to a reasonable agency-determined rental. In a more familiar application of the same principle, this Court has held that the Seventh Amendment was not infringed by the creation of new substantive duties and their enforcement by the National Labor Relations Board without trial by jury. See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48 (1937).[40]

The principle of these cases has no conceivable application here. The landlord's suit to regain possession when the tenant has breached his lease through nonpayment of rent falls among the oldest actions known to the common law. The Superior Court is not an expert agency but a court of record presided over by a judge. Whether a statutory eviction proceeding was subject to jury trial under the Seventh Amendment was not adverted to in the *Hirsh* case, where the Court took pains to point out that the emergency legislation left "little to decide except whether the rent allowed is reasonable, and upon that question the courts are given the last word." 256 U.S. at 158.

Lastly, in seeking to support a denial of jury trial on the eviction issues the lower court adverted to *Lindsey v. Normet, supra.* That case involved challenges, on equal

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[40] In the normal instance, a proceeding before an agency would not be in the nature of a suit at common law, and the special expertise that agencies are commonly designed to embody is not consistent with the use of the jury. L. Jaffe, *Judicial Control of Administrative Action* 90-91 (1965). There must, of course, be some outer limits; for example, one could hardly satisfy the principle of the Seventh Amendment merely by announcing that a trial court should hereafter be regarded as an expert agency. The important and complex issues raised in this area are not presented here since Congress has not purported to entrust landlord and tenant proceedings to an expert administrative agency.

protection and due process grounds, to Oregon's statutory eviction proceeding and—as the lower court recognized (A. 20)—did not and could not resolve any Seventh Amendment question: this is so both because the Seventh Amendment is not applicable to the states, either directly or through incorporation in the Fourteenth Amendment, and because the Oregon statute did provide for trial by jury.

The lower court suggested, however, that the *Normet* decision establishes that the Oregon statutory eviction proceeding is "plainly distinguishable" from the common law action in ejectment (A. 19). The "one historic difference" between the statutory remedy and ejectment adduced by the lower court (A. 19) is, as it happens, derived from a quoted passage in *Normet* that has nothing to do with distinguishing the statutory remedy from ejectment.[41] In any event, the lower court's basic approach misconceives the issue: every statutory action differs in some respect from a common law counterpart or the statute would not have been passed.

What matters for Seventh Amendment purposes is that the elemental components of the statutory eviction proceeding, the right involved and the remedy sought, are those provided by classic actions at common law in-

[41] In the passage quoted by the lower court (A. 19-20; 405 U.S. at 71), this Court observed that the statutory remedy was prompted at least in part by a desire of state legislatures to prevent the resort to self-help evictions still permitted by the common law and the attendant risk of breach of the peace from forcible expulsions and resistance by the tenant. However, in making this statement this Court plainly was not distinguishing between the action of ejectment and a statutory eviction proceeding. The action of ejectment was not a warrant to the tenant to exercise self help: it was a legal proceeding which terminated in a judgment for possession (see II Pollock & Maitland 109, 570-71 n. 3) and there is nothing in *Normet* which suggests the contrary.

cluding novel disseisin, writ of entry, and ejectment. In fact, the *Normet* decision invoked novel disseisin in explaining that the basic approach of the Oregon statute, focusing purely on the right to possession, had firm roots in history. See 405 U.S. at 68 n. 14. In all events, cases from *Parsons v. Bedford* through the most recent decisions in this Court dealing with jury trial put to rest any thought that the right may be withheld because of incidental differences in procedure and practice which make the new claim an improvement upon older ones.

III. THE SEVENTH AMENDMENT ALSO REQURES A JURY TRIAL ON THE TENANT'S MONEY CLAIMS ARISING FROM THE LANDLORD'S BREACH OF HIS LEASE OBLIGATIONS INCLUDING THE IMPLIED WARRANTY OF HABITABILITY.

A. The Historical Counterparts of the Tenant's Money Claims for Breach of Lease Obligations Are Common Law Actions Triable to a Jury.

Independent of the tenant's right to jury trial in defending against eviction in the statutory proceeding, the tenant in this case was entitled under the Seventh Amendment to a jury trial on the issues raised by his affirmative money damage claims. Pernell not only resisted eviction but asserted claims for the recovery of $75 in back rent and $389.60 for improvements made in an effort to bring the premises into partial compliance with the District's housing regulations. It is not disputed that Pernell was entitled to assert these claims in the eviction proceeding and, if successful, to obtain a money judgment against his landlord.

If Pernell had been able to prove that his landlord had violated his lease obligations by failing to maintain the

premises in habitable condition, then under *Javins v. First National Realty Corp. supra,* and *Brown v. Southall Realty Co., supra,* the jury would have been entitled to find that the landlord's breach of his agreement abated Pernell's obligation to pay rent;[42] and, to the extent that Pernell could establish that he had paid rent or purchased improvements in reliance upon the lease, the jury could have awarded damages to him at least up to the amount of rent paid and expenditures made. See Landlord and Tenant Rule 5(b).[43] Consequently, there were several factual questions presented by Pernell's money claims including the question whether and to what extent the landlord had failed to maintain decent premises and whether and to what extent Pernell had made rental payments or expended sums for improvements to make the premises habitable.

These factual issues largely overlap factual issues raised by Pernell's defense to the eviction. This is plainly so with respect to the habitability question, and the

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[42] The warranty of habitability exists not only in the District but in a number of other jurisdictions. *Hinson v. Delis*, 26 C.A.3d 62, 102 Cal. Rept. 661 (1st Dist. 1972); *Lemle v. Breeden*, 51 Haw. 426, 462 P.2d 470 (1969); *Jack Spring, Inc. v. Little*, 50 Ill.2d 351, 280 N.E.2d 208 (1972); *Rome v. Walker*, 38 Mich. App. 432, 196 N.W.2d 850 (1972); *Kline v. Burns*, 111 N.H. 87, 265 A.2d 248 (1971); *Marini v. Ireland*, 56 N.J. 130, 265 A.2d 526 (1970); *Morbeth Realty Co. v. Rosenshine*, 323 N.Y.S.2d 363 (N.Y.C. Civ. Ct. 1971); *Pines v. Perssion*, 14 Wis.2d 590, 111 N.W.2d 409 (1961).

[43] Under Rule 5(b) of the Landlord and Tenant Rules, the tenant may in defending the action for possession assert his own claims "for a money judgment based on the payment of rent or on expenditures claimed as credits against rent . . . ." See *Javins v. First National Realty Corp., supra,* 138 U.S. App. D.C. at 371, 428 F.2d at 1073; *Clover v. Shapiro*, 99 D.W.L.R. 1897 (D.C. Superior Ct. 1971).

expenditures would also have been relevant to the question whether any rent was owing if they were made to remedy the landlord's omissions and thus achieve compliance with the District housing regulations. In all events the issues raised by Pernell's money claims, if those claims are deemed "legal," would be subject to trial by jury, whether or not a defense to the eviction proceeding standing alone would be subject to the Seventh Amendment. See *Dairy Queen v. Wood, supra,* 369 U.S. at 471; *Beacon Theatres v. Westover, supra,* 359 U.S. at 505.

Claims for money damages are the paradigms of actions triable to juries at common law. Almost every claim for compensatory money damages falls within or is closely analogous to one of the old common law forms of action: most tort claims constitute trespass or trespass on the case, while contract and related claims are usually descendants of common law actions in debt, covenant or assumpsit. See 5 Moore para. 38.11[5]; *Ross v. Bernhard, supra,* 396 U.S. at 533. As Professor Moore states elsewhere, "the traditional, although not the exclusive, relief given by the common law courts was a money judgment for damages" and "where damages constitute the sole relief sought, the action is legal in character and there is normally a constitutional right of jury trial." 5 Moore para. 38.19[1], at 166 (footnote omitted).

Not only is the relief sought legal in character but the right asserted falls within the framework of classic common law actions triable to a jury. The holding of *Javins* was briefly summarized at the outset of the opinion, where the court stated "that the warranty of habitability, measured by the standard set out in the Housing Regulations for the District of Columbia, is implied by operation of law in all leases . . . of urban dwelling units covered by those regulations and that

breach of such warranty gives rise to the usual remedies for breach of contract." 138 U.S. App. D.C. at 369, 428 F.2d at 1071.

Where a lease contract or agreement has been violated and one party seeks relief by way of money damages, the mode of enforcement is through common law actions triable to a jury. In medieval times in England, the action for breach of covenant was devised precisely in order to provide the tenant with a remedy in such situations; for example, the tenant might bring an action in covenant for breach of the lessor's implied covenant of quiet enjoyment, and he might recover either damages or possession in such an action. See III W. Holdsworth, *History of English Law* 213 (3d ed. 1927) (hereafter "Holdsworth"); II Pollock & Maitland 216-20; Maitland 47. Covenant is, of course, a common law action triable to a jury. 5 Moore para. 38.11[6], at 120.[44]

At one time the peculiar characteristics of covenant distinguished leases from other forms of contract but over time the differences diminished. I J. Casner, *American Law of Property* §3.11 (1952). Eventually, the most modern of "contract" actions—assumpsit—began to supersede covenant even where leases were involved; by the early eighteenth century, for example, the landlord's right to sue in assumpsit for rent due on a lease for years was established. VII Holdsworth 272. As matters stand today, leases are commonly regarded as bilateral contracts and breach of lease provisions gives rise to a conventional contract action for damages. 3A A. Corbin, *Contracts* §686 (1960). There is no question that such an

[44] The action "is almost always what we should call an action on a lease . . . [T]he action therefore becomes popular as leases for terms of years become common." II Pollock & Maitland 217 (footnote omitted).

action is legal and is subject to the Seventh Amendment.[45]

The lower court sought to escape these implications by emphasizing the role of warranty as underpinning the contractual legal obligation asserted by Pernell against Southall (A. 25-26). Warranties, however, were a familiar and recognized subject of litigation in the common law courts from medieval times onward. W. Prosser, *Torts* §95, at 634 & n. 42 (4th ed. 1971). Initially, warranties were enforced through tort actions, specifically trespass on the case. *E.g., Chandelor v. Lopus*, Cro. Jac. 4, 79 Eng. Rep. 3 (Ex. Ch. 1603). During the eighteenth century, assumpsit was invoked to enforce a warranty (*Stuart v. Wilkins*, 1 Doug. 18, 99 Eng. Rep. 15 (K.B. 1778)), and warranty ultimately evolved into its present form in which it is normally enforced through contract actions. Prosser, *supra*, §95, at 635. Trespass on the case, like assumpsit, is triable to a jury. 5 Moore para. 38.11[5], at 120.

There is equally little basis for the lower court's assertion in this case that there is no Seventh Amendment right to jury trial on Pernell's money claims because "an implied warranty of habitability measured by the housing regulations was not an issue tried in any suit at common law in England in 1791" (A. 26). The nature of the basic claim involved here—a claim for damages for breach of an implied contractual obligation—is obviously not changed because the subject of the contractual promise or obligation is modern rather than medieval. Common sense forbids any such argument, and it is inconsistent with numerous decisions of this and other courts.

[45] "An action for damages for breach of contract is legal in nature and triable to a jury." 9 Wright & Miller §2316, at 77-78. *E.g., Simler v. Conner*, 372 U.S. 221 (1963); *Ross v. Bernhard*, *supra*, 396 U.S. at 542.

A vast number of transactions in modern contract and warranty law relate to promises or obligations that could scarcely have been conceived in the eighteenth century or before. Obviously a breach of warranty action relating to an atomic power plant was not "an issue tried in any suit at common law in England in 1791" nor were there suits concerning contracts to deliver transistor radios. Under the Seventh Amendment it is not the subject of the particular contract or obligation that requires a common law counterpart; it is the basic nature of the claim advanced by the litigant which must reflect rights and remedies triable to juries at common law.

The decisions clearly support this view. For example, in *Dairy Queen v. Wood, supra,* the Court held that the Seventh Amendment required a jury trial insofar as the claim there involved was regarded as a contract action to recover damages for breach of a franchise agreement allocating exclusive use of a statutory trademark. 369 U.S. at 477. The Court certainly did not consider it necessary to show that there were contract actions in 1791 in which the substance of the dispute related to franchise agreements allocating statutory trademarks. More broadly, it has been settled doctrine at least since *Parsons v. Bedford, supra,* that not only new issues but new causes of action are subject to the Seventh Amendment where, by historical counterpart or analogy, they more closely resemble common law actions rather than matters falling within the equity or admiralty jurisdictions.

A warranty of habitability is far less a departure from common law principles than a statutory proceeding to recover a penalty for soliciting the immigration of contract laborers into the United States; or a statutory proceeding to obtain reparations for violations of the

Interstate Commerce Act; or a suit to recover special overtime compensation and liquidated damages; or a statutory proceeding by the Government to recover rental overcharges collected in violation of the Emergency Price Control Act. None of these precise subjects was litigated in England in 1791, yet in each of these instances the courts found or assumed that damage actions under these statutes were analogous to traditional common law actions and contemplated that trial by jury was available to the litigants.[46]

Finally, it is of no importance whether Pernell's claims for money damages be viewed as a set off and a counterclaim, as his answer alleged (A. 13), or as recoupment and set off, as the lower court conjectured (A. 25). These terms do not relate to the basic nature of the claims but rather to highly technical and elusive distinctions which determined prior to merger when a defendant might assert a responsive claim in the proceeding. See James §10.14, at 472-74; C. Clark, *Code Pleading* §100, at 633-65 (1947) (hereafter "Clark"). The lower court did not assert these distinctions as a basis for denying trial by jury, so they need not be scrutinized at length.[47]

[46] *Hepner v. United States, supra,* 213 U.S. at 115; *Meeker & Co. v. Lehigh Valley R.R., supra,* 236 U.S. at 430; *Olearchick v. American Steel Foundries, supra,* 73 F. Supp. 273 (W.D. Pa. 1947); *United States v. Jepson*, 90 F. Supp. 983 (D. N.J. 1950). See also authorities cited at p. 20, above.

[47] The court did say in passing, however, that its rules referred to recoupment and set off as "equitable." It is therefore pertinent to note that in fact they are not peculiarly equitable. Recoupment is a long established common law device, historically associated with contract actions tried to juries in the common law courts (James §10.14, at 572-73; Clark §100, at 635); and set off, though first allowed in courts of equity, was permitted in both English and American colonial courts of law well before the adoption of the Seventh Amendment. James §10.14, at 473-74; Loyd, "The Development of Set-Off," 64 *U. Pa. L. Rev.* 541, 551-62 (1916).

B. Practical Considerations Favor the Trial of the Tenant's Money Damage Claims to a Jury.

The factual issues presented by Pernell's affirmative claim for damages—notably, habitability and expenditures—largely coincide with the issues that would be decided in litigating the right to possession. See pp. 32-33, above. In addition, the jury in passing upon the damage claims would presumably calculate the amount owed by the landlord to the tenant in the event that the tenant prevailed; however, even in the absence of affirmative damage claims, it would be proper practice for the jury to make a similar calculation if it found in favor of the landlord.[48]

Thus, for the reasons stated earlier with respect to the right to possession, the claims for money damages are eminently suitable for disposition by a jury. See pp. 31-34, above. However, there is an additional practical reason favoring submission of the damage claims to a jury in the present circumstances. Provision of jury trial will operate to enhance judicial efficiency by encouraging efficient resolution of all relevant claims of both the landlord and the tenant in a single trial by a single factfinder. By contrast, the denial of a jury trial will discourage such efficient resolution and will, in various instances, require fragmentation of factual determinations between judge and jury or even separate trials.

Whatever may be the Seventh Amendment status of Pernell's money damage claims, it is inevitable that claims

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[48] Under District law a judgment for possession based on nonpayment of rent is supposed to reflect the amount of rent found due so that the tenant may pay the money at once and avoid forfeiture. See *Trans-Lux Radio City Corp. v. Service Parking Corp.*, 54 A.2d 144 (D.C. Mun. App. 1947); *Javis v. First National Realty Corp., supra,* 131 U.S. App. D.C. at 381, 428 F.2d at 1083.

will be asserted in eviction proceedings on which jury trials must be afforded. For example, even if this Court sustains the denial of jury trial on Pernell's money damage claims, it may agree that Pernell was entitled to jury trial on Southall's eviction claim.[49] Alternatively, the landlord may assert a money claim against the tenant based on alleged failure to pay rent, a contract claim of the most traditional kind having nothing to do with habitability; or the tenant may assert a counterclaim based on his payment of rent where the landlord's breach is based on explicit lease conditions and not on lack of habitability.[50]

In each of these instances, the right to jury trial would attach at either party's request to the claims in question. Under the priority rule of *Beacon Theatres* and *Dairy Queen*, factual issues common to these claims and to the tenant's money damage claims based on breach of warranty of habitability would also be tried to the jury. See p. 44, above. Severable non-common issues would, however, on the lower court's theory be tried to the court. It is difficult to think of a more complicated or less satisfactory result, yet it would be a direct consequence of denial of jury trial on money damage claims made by the tenant.

This Court has previously emphasized that the use of one factfinder in a single case is highly desirable and, where one or more claims in a proceeding are triable to the jury as of right, it may serve judicial efficiency to

[49] However the implied warranty of habitability may be viewed, the claim of a landlord to repossess rented premises on account of alleged nonpayment of rent is certainly one that was triable to a jury at common law long before 1791.

[50] Both types of claims are expressly permitted in an eviction proceeding in the District. Landlord and Tenant Rule 3 (landlord's rent claim), 5(b) (tenant's counterclaim).

submit to the jury other claims not subject to the Seventh Amendment but arising in the same factual context. *Fitzgerald v. United States Lines*, 374 U.S. 16 (1963). The claims in a District eviction proceeding are, by definition, limited to the landlord's claims for possession, furniture and back rent, and to money damage claims of the tenant based on payment of rent and expenditures claimed as credits against rent. Landlord and Tenant Rules 3, 5(b). Such claims arise out of a common core of facts and will often be closely intertwined. To fragment them in ways that leave some factual issues to the jury and some to the judge merely invites confusion, repetition and even inconsistency, and the practical solution—if practical considerations are given weight—is to submit all of the interrelated factual questions to the jury.

The denial of jury trial on the tenant's money damage claims based on warranty of habitability may, indeed, lead not merely to a prolonged trial but to two trials rather than one. The lower court recognized that there could be money damage claims made in an eviction proceeding triable to a jury as of right (A. 28), and of course Pernell's own claims would be among them if this Court rejects the lower court's view of the warranty of habitability. Therefore, as an alternative ground, the lower court asserted that "if [the tenant] wishes to litigate any counterclaim for damages against a landlord before a jury, he should institute his own action" (A. 28) (footnote omitted).

We discuss at pp. 52-57, below, our contention that this alternative ground for denial of jury trial is not compatible with the Seventh Amendment and finds no sanction in this Court's decision in *Lindsey v. Normet, supra.* What is here relevant, in weighing the practical considerations, is that this course may and in various

instances must result in two trials rather than one; and it can hardly be suggested that this is efficient by any standard. *Blonder-Tongue Labs., Inc. v. University of Illinois Foundation*, 402 U.S. 313, 329-30 (1971).

The lower court's approach would mean, for example, that a landlord often could not litigate his own claim for past rent due in the eviction proceeding but would have to bring an independent action afterwards.[51] Similarly, a tenant who wished to preserve his right to jury trial on his own money damage claims otherwise triable to a jury would have to defer them to a separate proceeding. Whether or not collateral estoppel operated in the second trial to foreclose relitigation of factual issues litigated in the first, inevitably there would often be some issues which were not common and would have to be litigated in the second case.[52] That second case would be unnecessary if money damage claims were triable before a jury in the eviction proceeding.

C. The Decision of This Court in *Lindsey v. Normet* Did Not Sanction the Denial of Jury on a Tenant's Damage Claims.

While asserting that Pernell's damage claims were not truly legal in character, ultimately the court below

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[51] Landlord and Tenant Rule 3 contemplates that the landlord in such a proceeding may seek a money judgment based on rent in arrears. Assuming the landlord did not request a jury trial, the tenant would certainly be entitled to do so.

[52] When and how collateral estoppel operates in a subsequent action for money damages following an eviction proceeding is an open question in the District at this time as a result of the recent court reorganization. Compare, *e.g.*, *Tutt v. Doby*, *supra*, with the lower court's statement in this case declining to say whether it would follow *Tutt* hereafter (A. 26 n. 22). See generally *M.A.P. v. Ryan*, 285 A.2d 310 (D.C. Ct. App. 1971).

adopted a quite different, alternative ground for its decision to withhold a jury trial on the damage claims, relying on this Court's decision in *Lindsey v. Normet, supra*. *Normet* held that a state could, consistent with due process and equal protection requirements, confine the issues in an eviction proceeding to the tenant's breach of his lease and remit the tenant to an independent action to assert affirmative damage claims of his own. The court below concluded that "in light of this [*Normet*] opinion" there was no constitutional infirmity in requiring a tenant to institute an independent action "if he wishes to litigate any counterclaim for damages against a landlord before a jury . . ." (A. 28).

What the court below seemingly meant is that, because the District of Columbia arguably could have excluded money claims from the eviction proceeding altogether, it was entitled to allow them to be asserted only on *condition* that the tenant surrender his constitutional right to trial by jury where it would otherwise attach. The court below has misunderstood the holding of *Normet*, which did not involve—let alone sanction—any limitation upon trial by jury. See p. 41, above. Unlike the statutory regime adopted by Oregon at issue in *Normet*, the District does not preclude but expressly permits the tenant in a statutory eviction proceeding to assert money claims, based on his rent payments or based on improvements made by him where the landlord has failed to maintain a decent premises.[53] Since the money claims are properly asserted in this case, the only question is

[53] Under the substantive law of Oregon, a landlord's failure to maintain habitable premises was not a defense to an eviction proceeding and the Court specifically contrasted this situation with the substantive law of other states where warranty of habitability is imposed or implied and, if breached, constitutes a defense in an eviction proceeding. 405 U.S. at 609 & n. 15.

whether they are claims of a kind for which the Seventh Amendment guarantees a trial by jury.

The lower court's reliance on *Normet* is additionally infirm because there is no statutory or regulatory basis for concluding that, in order to assert his affirmative damage claims in the course of a statutory eviction proceeding, the tenant is obliged to waive a constitutional right to trial by jury which would otherwise be his. On the contrary, the Superior Court's own civil rules assure litigants that they are entitled to a trial by jury under the Seventh Amendment and the Landlord and Tenant Rules specifically contemplate that trial by jury may be had, where the cause is triable to a jury, in a landlord and tenant proceeding. See p. 7, above.

Any determination that a tenant must waive his right to trial by jury if, but only if, he chooses to assert his damage claims in the statutory eviction proceeding must raise the most serious constitutional objections. Apparently the court below believed that since the District of Columbia did not under the *Normet* decision need to permit the tenant to assert money damage claims in the eviction proceeding, the court could properly require the tenant to waive this constitutional right to trial by jury as the price of asserting the claims. The decisions of this Court establish, however, that a state may not thus penalize or burden the exercise of constitutional rights except, if at all, on the most potent showing of necessity.

In numerous cases, this Court has found that constitutional rights were impermissibly chilled by the burdens or conditions imposed on their exercise, even though in a number of those cases colorable state interests were advanced to justify the limitations.[54] In the

[54] *E.g.*, *United States v. Jackson*, 390 U.S. 570 (1968) (Sixth Amendment right to trial by jury penalized by risk of greater

present case no reasons are or could be provided to explain legitimately why a tenant should be allowed to assert money claims in an eviction proceeding if, but only if, he does not assert his constitutional right to trial by jury. Certainly the lower court's closing reference to desired efficiency in eviction proceedings will not meet this standard (A. 29).

It is highly dubious whether the prospect of a briefer trial where the jury is omitted could ever justify denying a litigant the opportunity for trial by jury. The judgment that any additional time required for jury trial is well spent is embodied in the Seventh Amendment itself. There are, moreover, ways in which a jury trial can be made more efficient without impinging on the right to jury trial itself. For example, the Superior Court's rules already provide for the use of six-man juries (see Civil Rule 38-I) and it would not be difficult to develop brief standard instructions on the issue of habitability. See *Javins v. First National Realty Corp.*, *supra*, 138 U.S. App. D.C. at 380-81, 428 F.2d at 1082-83.[55]

In any event, claims that dispensing with the jury will enhance judicial efficiency, dubious as applied to determining the right to possession, would be extravagant if advanced to explain denial of a jury trial in the eviction

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punishment where jury demanded); *Griffin v. California*, 380 U.S. 609 (1965) (Fifth Amendment privilege against self-incrimination burdened by comment on silence); *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966) (right to vote subject to poll tax); *Sherbert v. Verner*, 374 U.S. 398 (1963) (exercise of religion limited by loss of unemployment compensation); *Lamont v. Postmaster General*, 381 U.S. 301 (1965) (First Amendment rights burdened by requiring request for political mail).

[55] The most recent edition of *Standardized Jury Instructions for the District of Columbia* (rev. ed. 1968) presents brief but comprehensive instructions on the existence, nature, exclusion and breach of various implied warranties. *Id.* at 230-34.

proceeding on the tenant's own money damage claims. For, as the court below recognized, the tenant's recourse to preserve his right to jury trial would be to "institute his own action" in the Superior Court independent of the eviction proceeding (A. 28). As a result, there would be two trials rather than one with many of the same issues involved.[56] The rule adopted by the lower court is thus not only at odds with the Seventh Amendment but with the very goal of judicial efficiency asserted by the lower court. See pp. 51-52, above.

Consequently, on any view of the matter there is no substantial state interest to set against the right of the tenant to a jury trial on his claims for money damages in the eviction proceeding; and there is thus no necessity to weigh one against the other in determining whether the court could, given a compelling state interest, require the tenant to waive his right to trial by jury or reserve his damage claims for an independent action. Yet, even if it were assumed that efficiency would be enhanced by such a measure, to accept this justification could not be reconciled with the importance of jury trial in our constitutional heritage. Particularly apt are the words of Blackstone in relation to forms of criminal trial that would circumvent and avoid the right of trial by jury:

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[56] It is hardly tenable to suggest that collateral estoppel based on an eviction could be employed to deny the tenant an opportunity to litigate his damage claims before a jury in a further proceeding. On the assumption that the tenant was otherwise entitled to a jury trial on his money damage claims, the very basis for withholding it in the eviction proceeding would be the supposed opportunity to obtain it in an independent action; and if that opportunity is denied through use of an expanded collateral estoppel doctrine, then the court's own justification for disallowing the jury demand in the eviction proceeding vanishes.

"And however *convenient* these [methods] may appear at first, (as doubtless all arbitrary powers, well executed, are the most *convenient*) yet let it be again remembered, that delays, and little inconveniences in the forms of justice, are the price that all free nations must pay for their liberty in more substantial matters; that these inroads upon this sacred bulwark of the nation are fundamentally opposite to the spirit of our constitution; and that, though begun in trifles, the precedent may gradually increase and spread, to the utter disuse of juries in questions of the most momentous concern." 4 Bl. Comm. *350.

The forms and means of jury trial may be improved and strengthened within broad limits. This Court has itself given approval to modern rules governing directed verdicts (*Baltimore & Carolina Line v. Redman*, 295 U.S. 654 (1935)) and to changes in jury composition, including most recently the six-man jury. *Colgrove v. Battin*, ___ U.S. ___ (1973). Jury trial, however, is improved so that it may be preserved, and this Court for over a hundred and fifty years has forbid measures, whether direct or oblique, that would deny jury trial itself in actions at law. See *Scott v. Neely, supra; Dairy Queen v. Wood, supra.*

CONCLUSION

For the reasons stated, the decision below should be reversed.

Respectfully submitted,

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APPENDIX A

The Seventh Amendment to the United States Constitution provides:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

D.C. Code § 16-1501 (Supp. V, 1972) provides:

> "When a person detains possession of real property without right, or after his right to possession has ceased, the Superior Court of the District of Columbia, on complaint under oath verified by the person aggrieved by the detention, or by his agent or attorney having knowledge of the facts, may issue a summons to the party complained of to appear and show cause why judgment should not be given against him for the restitution of possession."

D.C. Code § 16-1502 (1967) provides:

> "The summons provided for by section 16-1501 shall be served seven days, exclusive of Sundays and legal holidays, before the day fixed for the trial of the action. If the defendant has left the District of Columbia, or cannot be found, the summons may be served by delivering a copy thereof to the tenant, or by leaving a copy with some person above the age of sixteen years residing on or in possession of the premises sought to be recovered, and if no one is in actual possession of the premises, or residing thereon, by posting a copy of the summons on the premises where it may be conveniently read."

D.C. Code §16-1503 (1967) provides:

> "When, upon a trial in a proceeding pursuant to this chapter, it appears that the plaintiff is entitled to the possession of the premises, judgment and execution for the possession shall be awarded in his favor, with costs; and if the plaintiff becomes nonsuit or fails to prove his right to the possession, the defendant shall have judgment and execution for his costs."

D.C. Code §16-1504 (1967), repealed by 84 Stat. 560, provided:

> "When, upon a trial in a proceeding pursuant to this chapter, the defendant pleads title to the premises, in himself or in another under whom he claims, setting forth the nature of the title, under oath, and enters into an undertaking, with sufficient surety, to be approved by the court, to pay all intervening damages and costs and reasonable intervening rent for the premises, the court shall certify the proceedings to the United States District Court for the District of Columbia, and the proceeding shall be further continued in the District Court according to its rules."

D.C. Code §16-1505 (Supp. V, 1972) provides:

> "A judgment of the Superior Court of the District of Columbia in a proceeding pursuant to this chapter is not a bar to any afteraction brought by either party, and does not conclude any question of title between them, where title is not pleaded by the defendants."

APPENDIX B

Act of Maryland, 1793, ch. XLIII, reprinted in II W. Kilty, *Laws of Maryland* (1800), provided:

An ACT to provide a summary mode of recovering the poſſeſſion of lands and tenements holden by tenants for years, or at will, after the expiration of their terms. Lib. JG. No. 2. fol. 42.

BE IT ENACTED, *by the General Aſſembly of Maryland*, That in all caſes where lands, tenements or meſſuages, are let or leaſed for one or more years, or at will, and the leſſor or leſſors, their heirs, executors, adminiſtrators or aſſigns, ſhall be deſirous to have again and repoſſeſs the ſaid lands, tenements or meſſuages, after the expiration of the term or eſtate for which they were demiſed, let or leaſed, and for that purpoſe ſhall give notice in writing to the tenant or tenants in poſſeſſion to remove from and quit the ſame, if the ſaid tenant or tenants in poſſeſſion ſhall refuſe to comply therewith within one month after ſuch notice, and upon the end and determination of the ſaid eſtate or eſtates, upon complaint thereof made by the ſaid leſſor or leſſors, his, her or their heirs, executors, adminiſtrators or aſſigns, to any two juſtices of the peace of the county wherein the lands, tenements or meſſuages, are ſituate, and upon due proof made before them, the ſaid juſtices, that the ſaid leſſor or leſſors had been quietly and peaceably poſſeſſed of the lands, tenements or meſſuages, ſo demanded to be delivered up as aforeſaid, that he, ſhe or they, long to poſſeſſed as aforeſaid, let or leaſed as aforeſaid the ſaid lands, tenements or meſſuages, for a term which is now paſſed and expired, and that they have given notice in the manner aforeſaid to the tenant or tenants in poſſeſſion to quit the ſame, and that the ſaid tenant or tenants have refuſed or neglected ſo to do, then and in ſuch caſe it ſhall and may be lawful to and for the ſaid juſtices, and they are hereby authoriſed and required, forthwith to iſſue their warrant, under their hands and ſeals, to the ſheriff of the ſaid county directed, commanding him to ſummon twelve good and lawful men of his bailiwick, to be and appear on the premiſes before the ſaid juſtices, on a day in the ſaid warrant mentioned, which ſhall be the fourth day after iſſuing the ſaid warrant; and alſo at the ſame time to iſſue their ſummons to the tenant or tenants in poſſeſſion, to be ſerved by the ſaid ſheriff, that he, ſhe or they, be and appear on the day and at the place in the ſaid warrant mentioned, to ſhew cauſe, if any he, ſhe or they have, why reſtitution of the poſſeſſion of the ſaid lands, tenements or meſſuages, ſo demiſed, let or leaſed, as aforeſaid, ſhould not be forthwith made to ſuch leſſor or leſſors, his, her or their heirs, executors, adminiſtrators or aſſigns; and if, upon hearing the ſaid parties, or in caſe the ſaid tenant or tenants in poſſeſſion ſhall neglect to appear, after being ſummoned as aforeſaid, proof thereof being made, it ſhall appear in teſtimony to the ſaid jury, and be ſo on their oath by them found, that the ſaid leſſor or leſſors had been in poſſeſſion of the ſaid lands, tenements and meſſuages, as aforeſaid, and that he, ſhe or they, had demiſed, let or leaſed them as aforeſaid, that the ſaid leaſe or eſtate is fully ended and expired, that due notice to quit as aforeſaid had been given to the ſaid tenant or tenants in poſſeſſion, and that he, ſhe or they, refuſed ſo to do, then it ſhall and may be lawful to and for the ſaid juſtices thereupon to award reſtitution of the poſſeſſion of the ſaid lands, tenements and meſſuages, and ſhall forthwith iſſue their warrant, under their hands and ſeals, to the ſheriff directed, commanding him forthwith to deliver to the ſaid leſſor or leſſors, his, her or their heirs, executors, adminiſtrators or aſſigns, the poſſeſſion of the ſaid lands, tenements and meſſuages, in as full and ample a manner as the ſaid leſſor or leſſors were poſſeſſed of the ſame at the time when the ſaid leaſe was made and executed, and the ſaid juſtices, in ſuch caſes, are further authoriſed and required to give judgment for coſts againſt ſuch tenant or tenants ſo holding over as aforeſaid, and thereupon to iſſue forthwith execution, if required by the ſaid leſſor or leſſors, his, her or their heirs or aſſigns; provided nevertheleſs, that if the ſaid tenant in poſſeſſion ſhall allege, that the title of the ſaid lands, tenements and meſſuages, is diſputed and claimed by ſome other perſon or perſons, whom he ſhall name, in virtue of a right or title accrued or happening ſince the commencement of ſaid leaſe, by deſcent, deed, or under the laſt will and teſtament of the ſaid leſſor or leſſors, and if thereupon the perſon ſo claiming as aforeſaid ſhall forthwith appear, or upon a ſummons, immediately to be iſſued by ſaid juſtices, and returnable in ſix days next following, ſhall appear before ſaid juſtices, and ſhall, on oath or affirmation, by the ſaid juſtices to be adminiſtered, declare, that he verily believes that he is entitled in manner aforeſaid to the ſaid lands, tenements and meſſuages, in queſtion, and ſhall, with two ſufficient ſureties, enter into bond to the leſſor or leſſors, his, her or their heirs or aſſigns, in ſuch ſum as the ſaid juſtices ſhall think proper, not leſs than three hundred pounds, to proſecute his, her or their claims at the next county court which ſhall be held in and for ſaid county thereafter, that then, and not otherwiſe, the ſaid juſtices ſhall forbear to award reſtitution of the poſſeſſion as aforeſaid, and ceaſe to give judgment for the coſts as aforeſaid; provided alſo, that if the ſaid claim ſhall not be proſecuted as aforeſaid, that the ſaid juſtices ſhall proceed to award reſtitution of the poſſeſſion as aforeſaid, and iſſue their warrant as aforeſaid, and give judgement and iſſue execution for the coſts as aforeſaid, within ten days after the end of ſaid court, in the ſame manner as herein before enjoined and directed.